No. 3905

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

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STATEMENT

(The numbers in parenthesis throughout this brief, unless otherwise stated, refer to pages of the Transcript of Record.)

Plaintiff is a dealer in hops, brewers' machinery and supplies in Chicago, Ill., where its business was estab-

lished in 1867. Defendants are growers of hops in Polk and Marion counties, Oregon. In 1917 they operated five yards under lease, and in January of that year submitted to plaintiff for acceptance contracts for the sale and delivery of hops to be grown by defendants on leased lands in Marion county, Oregon, during 1917, 1918 and 1919. The contracts were prepared by defendant W. J. Bishop using the regular printed forms in common use among hop growers and buyers, the written portions being filled in by him to conform to the quantity, price, description of lands, and other terms offered (63). W. J. Bishop had been in the hop business for nearly twenty years as buyer, seller, grower and commission merchant. Part of the time he represented large buyers and was quite familiar with hop contracts similar to the contract in question in this action. He had filled out many of them and all his experience had been with like grower's contracts (67), so that, when he wrote and forwarded the contracts for plaintiff's acceptance his act was not that of an unsophisticated farmer dealing with unfamiliar things. There was a separate contract for each of the three years named, identical in all respects except the year, but this controversy touches only the contract for the crop of 1919. After the contracts had been prepared by W. J. Bishop as aforesaid they were executed by defendants in duplicate and were mailed to plaintiff at Chicago accompanied by a letter (66). Plaintiff executed the contracts without alteration of a letter or figure and returned them to defendants (83). Plaintiff's duplicates

were recorded. The contract in suit is set out as Exhibit A, annexed to the complaint (6) and is admitted in the second paragraph of the amended answer (25).

It is also admitted that plaintiff in all respects performed all the terms of the contract on its part to be performed, and on March 29, 1919, advanced to defendants $1800, being three cents a pound for expense of cultivating the crop that year, and on September 4, 1919, advanced $3000, being five cents per pound for expense of picking sixty thousand pounds of hops (4, 25).

It was stipulated upon the trial that the total amount of hops grown and picked by defendants on the lands described in the contract in 1919 was 38,429 pounds and that defendants delivered only 28,882 pounds thereof, leaving 9,607 pounds undelivered (40).

The contract price of the hops was 11½ cents per pound but at the request of defendants plaintiff had increased the same to 16 cents (47). The contract fixed the measure of damages in case of default by either party as the difference between the contract price and the marekt value at Salem, Oregon, on October 31, 1919 (9-10). The undisputed testimony is that the market value at Salem, Oregon, on said date was 85 cents per pound (39).

Plaintiff brought its action for said difference, alleging in substance the making of the contract of January 26, 1917, wherein and whereby defendants sold to plaintiff 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands therein described, and agreed to deliver the same be-

tween the 1st and 31st of October, 1919; the performance by plaintiff of its covenants; the failure of defendants to deliver all the hops grown by them and the amount of the damage (2-5). Defendants filed an answer in which, after admitting formal matters and the execution of the contract, they denied that they thereby sold 60,000 pounds or any part thereof of the 1919 crop to be raised on said lands in excess of the actual amount of hops they were to receive out of said crop "after the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises", and admitted delivery of 29,592 pounds, and demand by plaintiff for delivery of the remainder of 40,000 pounds (13-14).

For a first separate defense the answer then alleged in substance that approximately 40,000 pounds of hops were grown on said lands in 1919 by the defendants, "and one Hop Lee, the owner of said lands and lessor of said lands to defendants, the lessees thereof, under a crop rental lease"; that during 1919 defendants leased from Hop Lee the lands described in the contract under a crop rental of one-fourth of the hops grown; that the contract between plaintiff and defendant *"was intended to, and did in fact, provide for the sale and purchase of all the hops of the crop to be raised on the premises described therein during the year 1919 and grown by the defendants"*, but was not intended to, and in fact did not include one-fourth part of the crop of hops grown on said premises belonging to and grown by Hop Lee, the owner of said premises, as tenant in common with de-

fendants of the crop grown by said Hop Lee and defendants jointly; that plaintiff knew of the lease by defendants from Hop Lee whereby the latter was to have one-fourth of the crop as rental and was a joint tenant with the defendants in the production and ownership of the crop; that it is inequitable to permit plaintiff to contend for a construction of the contract requiring defendants to sell and deliver to plaintiff all of the hops produced on said premises; that the agreement between plaintiff and defendant was intended to be and was an agreement on the part of defendants to sell to the plaintiff "as many pounds of hops not in excess of 60,000 pounds as might be grown and harvested by the defendants alone on and from said premises during the year 1919 and including only that part of the hops grown on said premises of which the defendants were the owners and to the delivery of which the defendants were to become entitled after there had been retained by Hop Lee, the owner of said premises, one-fourth part of the total crop produced thereon by him and by the defendants jointly to which one-fourth part said owner was entitled under the terms of his lease"; that *defendants are entitled to a construction of said contracts imposing no obligation to sell or to deliver hops in excess of 29,592* pounds, being the amount grown to which they were entitled to the possession; and that if said contract as written "by reason of the inadvertence and mistake of the parties in reducing the same to writing and thereby failing to set forth in writing their intentions and actual agreements, is not susceptible of the construction herein

contended for, defendants are entitled to a reformation of said contract so that the same will be reformed under decree of this Court so as to impose no obligation on the part of defendants beyond the obligation which they assumed and which it was the intention of the plaintiff and defendants to define and create" (13-17).

A second separate defense alleged, in effect, the existence of a custom and usage in the hop business in Oregon that hop ranches "should be leased upon a crop rental rather than upon a cash rental"; that by reason of the recital in said contract that defendants leased the premises therein described, and of the existence of said custom and usage and knowledge of the parties thereof, it was the intention of the parties to said contract to provide for the sale and delivery to plaintiff of only so many pounds of hops not in excess of 60,000 pounds as might be produced on said premises during 1919 of which defendants were owners; that their share amounted to 29,592 pounds which was delivered to plaintiff and was a full and complete performance of the contract; and that in justice and equity and by reason of said custom and usage and the intention of the parties the contract should be construed accordingly (17-19).

Plaintiff interposed demurrers to both of the separate answers, and a motion to strike those portions relating to the alleged lease, crop-rental, share of the landlord, construction of the contract, and all of paragraphs IV and VI of the first separate defense (20-21).

District Judge Bean granted the motion and sustained the demurrers in a memorandum opinion (22-24)

in which he said *inter alia:* "It is also alleged or stated in the answer that the contract as written and signed, by mistake omitted the condition that defendants should not be required to deliver to plaintiff the landlord's portion of the hops. It is true that in this court the defendant in a law action may set up an equitable defense but the answer does not go far enough to do so. It does not allege what the original contract was or that by mutual mistake the provisions permitting the delivery of hops to the landlord was omitted, and without allegation of that kind the answer would not be sufficient to justify a decree" (23).

Acquiescing in the construction of the contract which their original answer had thus invited, and abandoning every attempted defense save that of reformation, defendants grasped at the straw thus held out to them by Judge Bean's opinion and filed an amended answer (25-31) in which they rested their entire case on the theory that the contract as written by themselves in language and terms of their own choosing, is susceptible of no other meaning than that predicated of it by the complaint, but that it does not express the terms actually agreed upon by the parties and should be reformed on the ground of mutual mistake. Said amended answer admits the execution of the contract and the copy thereof annexed to the complaint as Exhibit A (6-12), and all other material averments of the complaint except that by said contract or otherwise they sold to plaintiff any hops in excess of the actual amount they were to receive as their share of the crop of 1919.

For a separate and affirmative defense the amended answer alleges, in substance, that during 1919, the lands described in the contract were under lease from Hop Lee to them on a crop-rental of one-fourth of the crop of hops grown thereon by them; that prior to the execution of the contract with plaintiff negotiations therefor were carried on at Chicago, Ill., for defendants acting through their agent A. C. Bishop; that said negotiations culminated in the agreement for the purchase by plaintiff from defendants of "60,000 pounds of so much of the hops to be grown in 1919 on the premises described in Exhibit A to plaintiff's complaint, to which the defendants would become entitled by the terms of the lease held by them"; that "by said agreement 60,000 pounds of hops were to be delivered by defendants to plaintiff *if the defendants' share* in the hops grown on said premises should be equal to, or in excess of, that amount, but in case *defendants' share* should amount to less than 60,000 pounds because of a shortage of crop, then defendants should deliver the full amount of *their share* of said crop"; that "by said agreement defendants further agreed to mortgage to plaintiff their *entire share* of said crop to secure advances made by plaintiff to them"; that the further terms of said agreement, not relating to the description of the hops sold, were as expressed in Exhibit A of the complaint (6-12); that thereafter said agreement was reduced to writing and prepared in Oregon where defendants executed it, but "by reason of the mutual mistake and inadvertence of the plaintiff and defendants in reducing said agreement

to writing" the same does not express the true agreement and understanding of the parties "in that the description of the hops sold to plaintiff by defendants as contained in said writing is as follows: *'60,000 pounds of hops of the crop to be raised and grown by the seller in the following year 1919, on the following described real estate'*, and the description contained in said writing of the crop to be mortgaged by defendants is as follows: *'The entire crop of hops to be raised upon the premises above described in the year 1919'*, which descriptions of the hops covered by said contract were, by reason of the mutual mistake and inadvertence of the parties, erroneous, and to make said descriptions conform to the true agreement and understanding of the parties as said agreement is set forth in paragraph III hereof (27), said provisions should be reformed and rewritten by this Court, so that the description of the hops to be sold by defendants to plaintiff should read as follows: *'60,-000 pounds of hops* OF THE SELLER'S SHARE *of the crop to be raised and grown in the following year, 1919, on the following described real property'*, and the description of the hops to be mortgaged by defendants to plaintiff should read as follows: 'THE SELLER'S SHARE OF THE *crop to be raised upon the premises above described in the year 1919.'*" The amended answer then alleges that the mutual mistake did not arise on account of the negligence of the defendants; that they did not discover the mistake until plaintiff demanded the hops; and, finally, that due to shortage of crop defendants' share of the hops grown on the premises described in Exhibit

A of the complaint during 1919 was only 29,592 pounds which were delivered to plaintiff in accordance with the alleged true agreement and understanding. A decree to reform the contract accordingly, and for costs was prayed (26-31).

The reply put the equitable defense thus pleaded in issue, and a trial was had on the Equity side of the court (32, 35) at the conclusion of which District Judge Wolverton said:

"The claim for reformation of the contract in the case is based upon a mutual mistake of the parties. I think there is no doubt that the sellers did make a mistake, or at least they were not careful enough in drawing their contract; but the plaintiff made no mistake. There has been no showing that there was a mistake on the part of the purchaser in the formation of this contract. The contract was written here by the sellers, and it was sent back to Chicago, and received there by the buyer, and the buyer signed it. There is no testimony here at all showing that there was any mistake made on the part of the buyer, and, in cases of this kind, the testimony must show by clear evidence that there was a mutual mistake between the parties. In such a case as that, the court will reform the instrument; otherwise, it will not; and I do not think, in this case, that the testimony supports a cause for reformation on the ground of mutual mistake. The equity case will therefore have to be dismissed" (35-36).

An order and decree was accordingly entered dismissing the separate answer and defense and continuing

the cause for further trial as an action at law (38-39).

The answer was not amended, no new pleading was filed, and the decision of Judge Bean on the motion and demurrers (22-24), and of Judge Wolverton on the equitable answer stripped the defendants of every defense save only three denials. Moreover, every possible legal proposition was thereby eliminated from the controversy. Only three issues remained, namely:

1. The averment in paragraph VII of the complaint (4) that defendants raised, grew and harvested 40,000 pounds of hops on said lands in 1919. Denied in paragraph IV of the amended answer (25).

2. Conversion by defendants of 10,748 pounds of said crop, paragraph VIII of the complaint (4). Denied in paragraph V of the amended answer (26).

3. Market value of hops at time for delivery, and amount of consequent damages, paragraph IX of complaint (4). Denied in paragraph VI of amended answer (26).

It is important to note that by the amended answer all pretense that the agreement with plaintiff is other than plain, certain and unambiguous, as Judge Bean said of it (22-23), is discarded. By asserting that they made a mistake in saying one thing when they intended to say another and invoking the equity arm of the court to rewrite their contract for them and correct their mistake, defendants admit that the agreement they did write is plain and certain—so plain and certain that their only relief is in reformation. The amended answer appealing to Equity conceded the hopelessness of

relief at law. No room was left for interpretation or construction. There was nothing to construe. Interpolation, not interpretation; destruction, not construction, was the only hope left; and after a full hearing, including a mass of testimony on custom and usage, hop leases, crop rentals, cash rentals, etc., Judge Wolverton denied the equitable relief sought. Defendants may have made a mistake or at least were not careful enough in drawing their contract, but there was no showing that there was a mistake on the part of the plaintiffs (35).

Therefore when the cause went to trial on the law side of the court before a jury on the issues thus narrowed, it was incumbent upon plaintiff to prove only the three facts above stated. A stipulation in open court covered the first and second, viz: amount of hops grown and amount delivered (40), and the testimony of two witnesses covered the third, viz: market value of hops at Salem, Oregon, October 31, 1919 (39). This, then, was the only issue remaining on which any evidence on the part of defendants was admissible and they offered none thereon. The contract itself had been under fire in two forums but had come out unscathed, and branded as definite, certain and unambiguous. It had just received a clean bill of health from a court of equity, and had never at any time been tainted with any charge of fraud, accident or undue influence.

Defendants, however, were permitted, over plaintiff's objection, to introduce testimony of preliminary negotiations and telegrams prior to the execution of the

written contract, evidence of leasing of the hop yards, terms of the lease, transactions between defendants and their landlord in relation to the crop, opinions of hop buyers and dealers as to the meaning of terms and expressions current in the hop business, production of the yards, and other irrelevant matters. The trial judge justified his admission of this testimony, as he said: "Not for the purpose of proving what the contract is, but for the purpose of informing the court and jury as to the condition and situation of the parties prior to entering into this contract, and to show the circumstances which led up to the contract, and *all for the purpose of enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into*" (57). In substance, this ground was restated in the concluding opinion wherein the court undertook to construe the contract (94-97) and held that defendants had obligated themselves to sell and deliver *only their share* of the hops to be grown by them on the lands described in the contract, and that *"it is presumed that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest"* (96).

Both sides requested the court to direct a verdict (98); but plaintiff's application was accompanied by a request to submit the case to the jury upon a controverted question of fact arising from the conflict between the testimony of August Magnus for plaintiff and A. C. Bishop for defendants (99). Plaintiff's requests

were refused and the court took the case from the jury by directing a verdict for the defendant.

From the judgment entered on the verdict so returned this writ is prosecuted.

SPECIFICATIONS OF ERROR

For brevity and convenience in discussion the thirty-two assignments of error (102-123) may be grouped under the following specifications:

1. Error in admitting testimony of the conversations, negotiations and telegrams of the parties preceding the execution of the written contract, and meaning of words and phrases used in said telegrams.

Exception No. 1 (41), Assignment 1, (103).
Exception No. 10 (56), Assignment No. 10 (108).
Exception No. 11 (57), Assignment 11 (108).
Exception No. 13 (59), Assignment 13 (110).
Exception No. 14 (60), Assignment 14 (111).
Exception No. 15 (60), Assignment 15 (111).
Exception No. 16 (60), Assignment 16 (111).
Exception No. 17 (61), Assignment 17 (112).
Exception No. 18 (62,) Assignment 18 (113).
Exception No. 19 (62), Assignment 19 (113).
Exception No. 20 (68), Assignment 20 (114).
Exception No. 21 (69), Assignment 21 (115).
Exception No. 22 (70), Assignment 22 (115).
Exception No. 23 (70), Assignment 23 (116).
Exception No. 24 (71), Assignment 24 (116).
Exception No. 25 (71), Assignment 25 (117).

Exception No. 26 (72), Assignment 26 (117).

Exception No. 27 (77), Assignment 27 (118).

Exception No. 28 (78), Assignment 28 (118).

2. Error in admitting testimony relating to defendants' leases, the terms thereof, the productive capacity of the leased lands and transactions between defendant and their landlord in respect thereto.

Exception No. 2 (49), Assignment No. 2 (103).

Exception No. 3 (49), Assignment No. 3 (104).

Exception No. 4 (50), Assignment No. 4 (105).

Exception No. 5 (50), Assignment No. 5 (105).

Exception No. 6 (51), Assignment No. 6 (105).

Exception No. 7 (51), Assignment No. 7 (106).

Exception No. 8 (52), Assignment No. 8 (106).

Exception No. 9 (56), Assignment No. 9 (107).

Exception No. 12 (59), Assignment No. 12 (109).

3. Error in refusing to direct a verdict for the plaintiff and in directing a verdict for the defendants.

Exception No. 30 (98), Assignment 30 (119).

Exception No. 32 (100), Assignment 32 (122).

4. Error in refusing to submit to the jury the question as to whether plaintiff had been informed prior to the execution of the contract, by A. C. Bishop, a witness for defendants, of the terms and conditions of the lease of the lands upon which the hops were to be grown.

Exception No. 31 (99), Assignment 30 (120).

ARGUMENT

The Pleadings

If the contract sued upon in this case is not uncertain or ambiguous in its terms it must follow that the trial court erred in admitting any testimony of conversations and negotiations of the parties prior to and at the time of its execution for the purpose of "enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into," or, indeed for any purpose. For three reasons: *First,* the rule of the "law of the case foreclosed all such matters; *second,* nothing in the pleadings justified such admission; and *third*, it was the court's duty to declare the meaning of a plain, certain and unambiguous contract without the aid of extrinsic evidence.

In the statement of this case we have stressed the fact that the pruning which was administered to the original answer by the decision and order of Judge Bean on the motion and demurrers, and the decree of Judge Wolverton dismissing the affirmative defense in the amended answer, deprived defendants of every defense founded upon alleged mistake or uncertainty in the contract, and of the situation of the parties at the time of its execution. The case was thereby cleared of rubbish and all defenses, save only denials of three facts alleged in the complaint, in the consideration of which neither the execution nor the interpretation of the contract was involved in the slightest degree.

This condition of the record was called to the court's attention early in the trial and in response to an application by defendants to amend their answer to meet the situation, the court said: "If you amended your answer, it would have to be amended in such a way as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out." (44-46.)

Now, the matter so referred to as no longer available to the defendants, comprises those portions of the original answer printed in italics in the Transcript at pages 13 to 17 thereof inclusive, and the whole of the first and second separate defenses therein at pages 14 to 19 inclusive. The matters thus eliminated from the case, and which defendants were thus, under the doctrine of the "law of the case," precluded from pleading are the identical matters upon which defendants offered proof and the evidence was admitted over plaintiff's objection. This evidence related to defendant's lease of the land on which the hops were grown, the terms of the lease, the landlord's interest in the crop, the intention of the defendants to contract to sell no more than their interest in the crop and to reserve one-fourth thereof for the landlord as crop rental, the construction of the contract accordingly, and a usage and custom to that effect. The court sustained an objection to evidence of custom and usage (47) but admitted testimony of every other matter.

If, as was ruled by the trial judge, those matters could

not again be incorporated in defendant's pleadings as matter of defense, by what legal legerdemain can testimony concerning them be justified? If Judge Bean's ruling (22-24) to the effect that they were immaterial and irrelevant, and constituted no defense to the complaint, became the law of the case so as to bar their further appearance in defendants' pleading, why does it not also bar evidence relating to them? In order to make that ruling Judge Bean necessarily had to find that the contract pleaded in the complaint was definite, certain and free from ambiguities,—in short, that no extraneous facts nor ascriptions of meaning to the written agreement were needed to disclose its plain intent. Unless he had so determined the motion and demurrers must have been denied and overruled. In reaching his conclusion he necessarily made a critical examination of the contract and assumed the truth of all facts well pleaded in the answer, which, of course, were admitted by the demurrers. The demurrers, however, did not admit the truth of conclusions pleaded in the answer, nor the ascription of a meaning to the contract not justified by its plain terms. (*Dillon* v. *Bernard,* 21 Wall. 437; *Gould* v. *Evansville R. R. Co.,* 91 U. S. 534; *Burling* v. *Newlands,* 112 Cal. 476, 44 Pac. 810; *O'Hara* v. *Parker,* 27 Or. 156, 166). If his ruling became the law of the case as to the immateriality of those extraneous facts as matter of defense in pleading, it also became the law of the case as to the interpretation of the contract against the enforcement of which evidence of those extrinsic matters was offered as a defense.

Notwithstanding the refusal of the trial judge to permit defendants to set up any of the matters of defense previously stricken out by another judge, he remarked at the conclusion of the trial: "I will say, as a premise, that the decision of Judge Bean, which was rendered upon motion to strike the complaint (sic), was upon the face of the contract as it was then produced, and his attention was not called to the facts and circumstances and conditions prevailing at the time the contract was entered into. Construing the contract as it appeared to him upon the face of it, he said that it was plain in its terms, and that the construction would follow from the language; but, as I have remarked, he was not in possession of the facts and circumstances and conditions prevailing at the time the contract was entered into. I have those facts and circumstances before me, and in that respect the conditions are different. I am passing upon a different situation from that which he passed upon at that time, and hence I say that his decision does not become the law of the case in so far as I have to deal with it now." (94-95.)

This fairly indicates the view of the trial judge which led to the rulings complained of, and comment thereon will set forth the position and contention of the plaintiff in this review. In the first place, Judge Bean's attention was not called to anything else than the contract set up in the complaint and the allegations of the original answer concerning the transaction, because in argument on demurrers and motions reputable counsel do not travel out of the record. Even had counsel been so

disposed there was no temptation to do so, because the answer attacked by the demurrers and motion alleged in great detail the very "facts, circumstances and conditions prevailing at the time the contract was entered into," referred to in Judge Wolverton's utterance above quoted. The same contract was under critical examination by both judges, and both judges were "in possession of those facts and circumstances and conditions,"—Judge Bean examined them in the form of averments in the original answer, Judge Wolverton considered them in the form of statements of witnesses. The former held that they did not belong in the case because the contract itself was explicit; the latter, although, in effect, conceding the first decision to be correct, held that said facts, circumstances and conditions presented a different situation and therefore the decision of the former did not become the law of the case. Judge Wolverton in the instant case did indeed pass on a "different situation," but the difference consisted only in two elements less than Judge Bean considered, namely, the plea of custom and usage, and right of reformation on the ground of mistake. Both of these were eliminated; the first by a ruling in the trial of the law action (47), and the second by Judge Wolverton's decision and decree in the Equity trial (34-39). It is difficult therefore to reconcile the concluding opinion of the trial judge (88-97) with his ruling that Judge Bean's decision on the motion and demurrers became the law of the case (46). It is impossible to reconcile it with what appears to be the settled doctrine in the Ninth Federal Circuit.

"The Law of the Case"

Whether the application of the doctrine of the "Law of the Case" be given the force and effect of res judicata, or whether it be considered only as a rule of judicial propriety and comity to avoid unseemly conflicts, it is one of very general observance and undeniably promotes the orderly and speedy administration of justice.

"It is a principle of general jurisprudence," said Sanborn, *Circuit Judge,* in *Shreeve* v. *Cheesman,* 16 C. C. A. 413; 69 Fed. 785, 790, "that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. The principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court." In *Meeker* v. *Lehigh Valley R. Co.,* 175 Fed. 320, it is held that where a demurrer to a complaint is sustained on the merits by one district judge, the ruling is conclusive on a subsequent demurrer filed to the complaint with immaterial amendments, heard before another judge of the same court of judge of the same court of concurrent jurisdiction. In *Hunter* v. *Ruff,* 47 So. Car. 525, 58 Am. S. R. 907, it is held that an order made by a circuit judge deciding that a party is not a party to a proceeding before him, if not appealed from, is absolutely binding upon any

succeeding circuit judge, whether right or wrong, and it is beyond the power of the latter to review or reverse such order. Similar views appear to be held in *Cromwell* v. *Simons,* 280 Fed. 663, 674 (C. C. A., 2d Circuit.)

Nowhere has the rule been more emphatically endorsed or received higher recognition as a standard of judicial conduct than in this circuit. In *Cole Silver Mining Co.* v. *Virginia & Gold Hill Water Co.,* 1 Saw. 685, 6 Fed. Cas. No. 2990, *Circuit Judge* Sawyer had granted a preliminary injunction (1 Saw. 470, 6 Fed. Cas. No. 2989), and subsequently a motion on bill and answer for its dissolution came on for hearing before *Mr. Justice Field* sitting in the Ninth Circuit. The learned justice said:

"The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

This was reaffirmed by the same judge in *Giant Powder Co.* v. *Cal. Vigorit Powder Co.,* 5 Fed. 197, 202, where it is observed that "this consideration to the different judges composing the court is essential to the harmonious administration of justice therein." The case in 1 Sawyer was cited and followed by *Circuit Judge*

Pardee in *Oglesby* v. *Attrill,* 14 Fed. 214, 215, who said: "Solicitor for defendant also moves the court that the substituted service of process heretofore made in this case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated by the district judge sitting in this court in the early stage of this case, 12 Fed. 227. This decision is not open to review to any other judge sitting in this court in the same case."

Wakelee v. *Davis,* 44 Fed. 532, is peculiarly apposite by reason of the similarity of the facts with the situation presented by the record in the instant case. On final hearing, as here, where the propositions of law presented were the same as on demurrer previously decided by another judge, *Judge* Coxe said (p. 533):

"Some testimony has been taken *pro* and *con,* but, upon all important questions, it is substantially conceded that the legal aspects of the cause remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the supreme court. A re-examination and discussion of the question involved is, therefore unnecessary, for the reason that the court is constrained to follow its former decision."

The same judge in the later case of *Hadden* v. *Natchaug Silk Co.,* 84 Fed. 80, said:

"It is, of course, my duty to follow the decisions of this court and of the circuit court of appeals even though a different opinion may be entertained upon some of

the propositions involved. Different judges do not make different courts. When the circuit court has spoken through any of its judges its decision should be, and generally is, regarded as controlling upon all the others. This is the spirit of American Jurisprudence. We sacrifice much to precedent. A proposition once decided between the same parties on similar facts must stand decided. It is of little moment that the decision was made by another than the sitting judge. If entitled to any consideration this circumstance gives the decision even greater weight. A judge may change his own mind; he cannot change the mind of another. Manifestly then, the first inquiry is, what has already been decided, and what, if anything, is left open for decision?"

Applying this test to the instant case it must be obvious that the facts attempted to be alleged in the original answer which, by the decision on demurrer and motion, were held to constitute no defense, are the same as those which the trial judge permitted to be proved and to control his interpretation of a contract which the first decision held was plain, certain and unambiguous and must be interpreted without those facts. No application was made for a rehearing on Judge Bean's decision and no appeal was taken therefrom, but under the terms of the order and in harmony with a suggestion in the decision, an amended answer was filed in which the matters that had been held irrelevant and immaterial were omitted. This brings the case in principle squarely within the doctrine announced by this court in *Presidio Mining Co.* v. *Overton,* 261 Fed. 933, where it is said (p. 939): "The motion to dismiss the bill was granted

unless the plaintiff within 20 days filed an amended bill stating a case for granting equitable relief. No application was made for a rehearing, and no appeal was taken from the decision. *The insufficiency of the original complaint thereupon became res judicata in the subsequent proceedings before Judge Van Fleet.*" (Italics ours.)

Nor would the application of the rule to the case at bar be repugnant to anything in *Circuit Judge* Gilbert's dissenting opinion in the same case as reported in 270 Fed. at page 407. It is there said: "If Judge Dooling had entered a final judgment dismissing the suit, which he did not, *the judgment would of course have been res judicata as to a second or concurrent suit on the same grounds as were disclosed in the original complaint,* but not if the judgment was for the omission of an essential averment which was supplied in the second suit." In principle the instant case comes clearly within the exception noted.

The original answer alleged matter contradictory to the terms of the contract in suit and sought a construction thereof in contravention of its plain language. This was coupled with a defective statement of the equitable defense of reformation grounded on mistake. The decision on the motion and demurrer eliminated all the new matter alleged except the mistake and held in effect that the latter by appropriate averments could be set up by an amended answer. (22-24.) This decision manifestly found that the contract is invulnerable to further attack on any ground other than mutual mistake, and necessarily was a dismissal of the answer as

to every other defense. On all points except reformation for mutual mistake it was a final judgment and therefore res judicata as to a second answer alleging the same grounds. And of course if further answer on the forbidden grounds was barred evidence tending to prove those grounds was also barred and should have been excluded by the trial court under the doctrine of law of the case.

The case comes within the narrowest limits of the rule, whose harshest application, that of maintaining a former decision although erroneous, is sometimes refused; but only when the former decision is manifestly erroneous, or the facts misunderstood, or a principle overlooked, or where the ruling sought to be reviewed was not necessary to the first opinion (18 Standard Enc. Proc. 804). Defendants are estopped from contending that Judge Bean's decision is erroneous because they neither applied for a rehearing nor stood upon their pleading, but answered over and after jettisoning their miscellaneous cargo of Hop Lee, crop-leases, and excuses, sailed into the only port the decision left open for them. Nor can it be said the facts were misunderstood because the decision turned on the contract itself viewed in the light of what defendants said about it in their original answer, which was at least as prolix and discursive as what their witnesses subsequently said; nor that a principle was overlooked because consideration of the questions raised required no more than knowledge of legal propositions so elementary that the veriest tyro would yawn at the reading of them; nor that the ruling

was not necessary because it went directly to the points raised by the motion and demurrers. Neither can the extent to which it went any further be questioned by defendants, because it suggested to them a method of properly pleading the only defensive matter which the decision itself left open to them. They filed an amended answer accordingly (24-31) in which they first allege that they held the lands described in the agreement under a lease from Hop Lee reserving one-fourth of the crop of hops as rental, and that prior to the execution of the writing negotiations were had between defendants, acting through their agent, A. C. Bishop, and plaintiff at Chicago, Ill., for the contracting of defendants' share in the 1919 crop to be raised. Two mistakes are alleged to have been made in reducing the contract to writing. The clauses as written: "*60000 pounds of hops of the crop to be raised and grown by the seller in the following year, 1919, on the following described real estate*" (Trans. 6), and "*the entire crop of hops to be raised upon the premises above described in the year 1919* (10), should have read respectively: "60000 pounds of hops *of the sellers' share* of the crop to be raised and grown in the following year 1919, on the following described real property" and "the *sellers' share* of the crop of hops to be raised upon the premises above described in the year 1919" (28). In all other respects the contract is admitted to be correct and free from mistake.

The issue on this defense was tried before Judge Wolverton sitting on the Equity side of the court and defendants were permitted not only to introduce evi-

dence relating to the negotiations prior to the execution of the contract and the terms of the lease, crop-rental, etc., but were permitted to introduce testimony tending to prove a custom and usage in the hop business in Oregon of growing hops on leased land whereby the landlord receives a part of the crop as rental. It was shown by the witnesses on this point, however, that lessees of lands for hop growing purposes sometimes paid cash rental, and that where crop rentals were paid they varied from one-third of the crop to one-fifth of the crop; in short that there was no uniform custom or usage on the subject but the matter rested in contract in each particular case. The evidence in the Equity case covered a wider range than that admitted by the same judge in the law action. Nevertheless, in the former a decree was entered dismissing the further and separate answer and defense (26-31, 38-39) on a decision holding in substance that the testimony did not support a cause for reformation on the ground of mistake (35-36).

THE EVIDENCE

Involved in the disregard of the issues of the pleadings, and doctrines of the law of the case, are the errors classed under the first specification above stated in admitting evidence objected to. The rule that evidence must conform to the pleadings, and be relevant and material to some fact in issue is a judicial platitude, yet it was violated twenty-eight times in the trial of this case. That the relevancy and materiality of testimony

are to be measured by the issue formed by the pleadings requires no citation of authorities here.

As has been stated, the trial opened with only three controverted issues under the pleadings. They were: Defendants raised 40,000 pounds of hops in 1919; they refused to deliver 10,000 pounds thereof; the market value of the 10,000 pounds was 85 cents per pound. The first two facts were admitted by defendants at the commencement of the trial so that the only issues remaining was the market value of hops at Salem, Oregon, on October 31, 1919. Now, what possible relevancy or materiality to that issue were the "facts and circumstances and conditions prevailing at the time the contract was entered into' (January, 1917), which the learned trial judge said that he and the jury were entitled to know? What light was shed on the market value of hops at Salem in October, 1919, by the conversations between W. J. Bishop and Albert Magnus or August Magnus in Oregon or Chicago, on the subject of the hop industry generally, at different times prior to 1917 (42, 103)? In what possible way and to what extent were the questions: "Do you know who had the lease of those lands in 1916"? (49) or "What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee" (50) relevant to the fact of market value? This inquiry might be prolonged to include all of the questions objected to comprising every exception save one down to No. 29. The errors are too obvious for argument. Mere inspection amounts to a demonstration. The incompetency of the evidence was so palpable that

after counsel for plaintiffs had once stated their position and the grounds of their objection, they avoided encumbering the record by interposing only general objections. This was sufficient; for, as was said in *State v. Bartlett,* 170 Mo. 658; 59 L. R. A. 756, 761; where evidence is no evidence at all such a "sheet lightning" objection is sufficient.

In *Prouty Lumber & Box Co. v. Cogan,* 101 Or. 382, 200 Pac. 905, on a state of facts quite analogous to those of the instant case, the court, by *Burnett, C. J.,* said:

"The relevancy and materiality of testimony are measured by the issue formed by the pleadings. In the instant case the defendants denied the complaint and made no other defense. Their offer to prove was entirely foreign to the issues thus formed. It was as if the pleadings had said: 'It is true, we owe the plaintiff $3,406.20 for the rived logs in question. However, we sold those logs to the Warren-Scott Company, which in turn by the consent of ourselves and the plaintiff agreed to pay the amount to the plaintiff, and we are to be discharged.' In other words, under the general issue the defendants were attempting to prove a novation, a proposition clearly outside the pale of pleadings or evidence, a clear variance.

There are authorities to the effect that the court of its own motion may prevent the introduction of improper evidence. Again, it is said that, a reason for the rule against general objections is that it is unfair to the trial court to make a general objection without particular specification of the grounds of the objection. But in good reason, if the trial judge is possessed of sufficient legal acumen to recognize the validity of the

legal conclusion suggested by the general objection, he is at liberty to decide the point and exclude the evidence offered. If for his own information the adverse party requires a more specific objection, he should move for the necessary specifications. He cannot rightly speculate on the decision of the court and then complain that the objection is too general. It is quite as much his duty to be fair to the court as it is that of the other party. Moreover, if he would prevail on appeal, he must put his finger on the error complained of. If the court is informed of the vice of the testimony offered, it is not necessary for the objecting party to put into his objection a brief on the subject, or to go into tautological detail."

In the instant case, paraphrasing the foregoing excerpt, defendants admitted the contract but denied the amount of damage. Their proof of negotiations leading to the contract, the lease, crop-rental, etc., was entirely foreign to the issue thus formed. It was as if the pleadings had said: "It is true we made the contract set up in the complaint, that we raised 40,000 pounds of hops on the land described, and that we have delivered only three-fourths thereof. However, we had agreed to deliver the other one-fourth of the crop to our landlord, and we are therefore discharged from liability to plaintiff."

The Oregon code contains two provisions on this subject which are but declaratory of what is and long has been the law everywhere:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can

be, between the parties and their representatives or successors in interest no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

O. L. Sec. 713.

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

O. L. Sec. 717.

As fully appears by the record, the alleged mistake or imperfection in the contract in question was put in issue and decided adversely to the defendants in the equity trial; the validity of the contract is not questioned; it was held by Judge Bean to be free from the only ambiguity ever imputed to it, and at no time has it been questioned for illegality or fraud. Consequently, there was no occasion for the trial judge to be placed in the position of the parties to the agreement. Only the first paragraph of section 713 above quoted applied;

and the court was not called upon to exercise any function with respect to the exceptions stated in said section. As stated by the Supreme Court of Oregon in *Allen* v. *Hendrick,* 206 Pac. 736, citing previous Oregon decisions bearing on Sections 713 and 717, *supra:* "Where the language of a writing is clear and unambiguous, extrinsic evidence is not admissible upon the ground of aiding the construction." Or, as stated in Clark on Contracts, p. 591, quoted with approval in *Cottrell* v. *Smokeless Fuel Co.,* 78 C. C. A. 366, 148 Fed. 594, 9 L. R. A. N. S. 1187: "The courts will not make an agreement for the parties, but will ascertain what they have agreed by what they have said and by the meaning of the words used to express their intention. Where the intention clearly appears from the words used, there is no need to go further, for in such cases the words must govern; or as is sometimes said, where there is no doubt, there is no room for construction." It is only when an instrument is uncertain, indefinite or phrased in ambiguous language that evidence of the circumstances under which it was made, situation of the parties and preliminary negotiations is admissible. Such facts are never admissible to create an uncertainty where none exists. The vice of the trial court's rulings lies just here. He took an agreement which his colleague on the bench had decided is certain, definite and free from ambiguity (with which conclusion, as based on the writing itself, he apparently agreed), and by receiving a mass of irrelevant testimony an uncertainty was created which otherwise did not exist. Then out of

that factitious dubiety there was evolved, under the guise of interpretation, a new contract for the parties. This was effected by excision and interpolation resulting in the identical changes which defendants had prayed for in their equitable defense for reformation, and which, while sitting as chancellor on the Equity side of the court, he had denied. Many defendants, if permitted to say what they choose and talk as long as they like could raise such a fog of words as to form a cloud of uncertainty around almost any instrument calling for the payment of money which they do not want to pay. It is a new way for a sophisticated person to pay old debts. It is unfortunate for defendants to have to pay 85 cents a pound for hops which they themselves had agreed to deliver for 16 cents a pound; but depreciation of hardship is no justification for relaxation, much less total disregard, of the fundamental rule designed to meet just such situations. The defendants chose their own language when they wrote this agreement; they had made many such contracts, and were dealing with a familiar subject; they must be presumed to have known the force and effect of the language in which they chose to embody their offer and contract; if they made a mistake it was entirely their own and the same judge had so held; plaintiff said nothing and did nothing but sign on the dotted line. In enforcing the contract in accordance with its plain intent the court was relieved from the responsibility, often attendant upon such cases, of determining whether the opposing party is guilty of misrepresentation or trickery. There is no such element

in this case. It was for the trial court, in the first instance, to hew to the line, leaving defendants to suffer the consequence of their own carelessness or mistake, for which their own writing provides the terms and measure.

It would be supererogatory to cite authorities to this court on this point, but a few concrete applications of the rule to similar situations may be excused.

In *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033, 1036, it is said:

"It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

Suppose A. C. Bishop did tell plaintiff, January 15, 1917, that the hops were to be grown on lands under a lease reserving one-fourth of the crop to the lessor as

rental? He did not make the contract; he merely wired his principles to take up the business with plaintiff direct (69, 72). Then, ten days later, when plaintiff received the contract prepared by defendants themselves in which they undertook to sell and deliver the entire crop and said nothing about excepting the landlord's share, had not plaintiff the right to rely on the words being used in their ordinary sense and to assume that defendants had either made a different lease or had protected themselves by some arrangement with their landlord? To hold otherwise effectuates the result of artfully misleading plaintiff by enabling defendants to contract with it on the supposition that their words meant one thing while the court adopts a construction by which they mean another thing more to defendants' advantage.

In determining the legal import of the provisions of a contract according to their own terms, the Supreme Court in another case, recalled "certain well settled rules in this branch of the law", in these words: "One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances can equity interpose." The opinion further quotes with approval from a decision by *Mr. Justice Harlan* in *Kihlberg* v. *U. S.*, 97 U. S. 398, 24 L. Ed.

1106: "The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

U. S. v. *Gleason,* 175 U. S. 588, 602; 44 L. Ed. 284, 289.

After discussing the cases involving this principle, the Supreme Court, in *Dermott* v. *Jones,* 2 Wall. 1, 17 L. Ed. 762, 764, says:

"The principle which controlled the decision of the cases referred to, rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provisions for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

The court below appeared to be impressed with the situation of the defendants in having obligated themselves to deliver one-fourth of their crop to their landlord, and intimated that in consequence they could not be presumed to have sold their entire crop (44). They could *contract* to sell what they did not own. The Uniform Sales Act, now a part of the law of Oregon, and which is merely a crystallized declaration of what has been the law everywhere for time out of mind, provides:

"The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired

by the seller after the making of the contract to sell, in this act called 'future goods.'

There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen."

O. L. Sec. 8169.

And there is an implied warranty in every contract to sell that the seller will have a right to sell the goods at the time when the property is to pass. Said the Circuit Court of Appeals in *Godkin v. Monahan,* 27 C. C. A. 410, 83 Fed. 116, 120:

"It is also well settled with respect to the interpretation of contracts that an engagement to perform an act involves an undertaking to secure the means necessary to the accomplishment of the object, and that whatever is necessary to the performance of the undertaking is part and parcel of the contract, and, although not specified in the contract, is to be implied and is in judgment of law contained in it." (Citing cases.)

A large portion of the commercial transactions of the country is comprised of just such contracts. Defendants incurred their obligation to their landlord before they wrote the agreement with plaintiff (52-57) yet made no protective provision in the latter. There was no room for a presumption as to what defendants would do because the court had their own account of what they actually did. And they had a right, as we have seen, to contract to sell and deliver the entire crop to be raised on the leased land. True, they assumed the risk of being unable to deliver one-fourth of it in case they should not be successful in acquiring the land-

lord's share; but that risk is precisely what every one assumes who contracts to deliver products and finds out afterwards that he cannot obtain the goods. Defendants could have guarded themselves from such consequences by a stipulation in the agreement with plaintiff, or by a contract with the landlord to buy his fourth of the hops; failing to do either they will have to pay damages. An excerpt from the opinion in *Osborn v. Nicholson,* 13 Wall. 654, 20 L. Ed. 689, 694, is appropos:

"It was formerly held that there could be no warranty against a future event. It is now well settled that the law is otherwise. Benj. Sales 463. The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other. *Dermott v. Jones,* 2 Wall. 1; *Revel v. Hussey,* 2 Ball. & B. 287."

And in *Chicago M. & St. P. R. Co. v. Hoyt,* 149 U. S. 1, 37 L. Ed. 625, 630, it is said: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract."

In *Coker v. Richey* (Or.), 204 Pac. 945, there was under consideration a contract for the sale of "all the pianos, piano players," etc., and the court said:

"Reduced to its lowest terms the effort of the defendant is to construct a contract entirely different in its terms and obligations from that expressed in the writing which both parties admit they signed. * * * It may be remarked that while the contract calls for a sale of 'all the pianos, piano players,' etc., the effort of the answer is to contradict the plain statement of 'all the pianos,' and to interpose exceptions to that language. For instance the answer says, in so-called explanation of the consideration: 'That said plaintiff would receive and pay to defendant in cash the actual inventory cost, with freight charges on all pianos and other musical goods then ordered and not yet received by defendant *that defendant should desire or ask plaintiff* to receive' * * * All of this outlines the position of the defendant in his answer to be not all of the goods were sold, but only such as he himself should desire to sell. If such efforts are to be countenanced, it would be child's play to reduce a contract to writing, and would operate as a virtual repeal of section 713 O. L."

In the case at bar the position is not even outlined in the answer, but sprang mushroom-like during the trial.

INSTRUCTIONS

The third and fourth specifications of error, comprising exceptions and assignments numbered 30, 31 and 32 (98-100, 119-122) challenge the refusal of the court to direct a verdict for the plaintiff, and, upon denial of a motion therefor, his refusal to submit the

cause to the jury upon a question of fact.

It may be contended that since each party requested a peremptory instruction for a verdict, and the court granted the request of defendants, both parties are estopped from claiming that any question should have been submitted to the jury; that all disputed questions of fact are determined in favor of the defendants and that the only questions open for review are, was there any substantial, legal evidence in support of the court's finding, and was there any error in the direction or application of the law?

Plaintiff could safely rest on the showing hereinabove made that there was no substantial, legal evidence in support of the court's finding; that all of the evidence objected to and admitted was utterly foreign to the issue and incompetent for any purpose, and that there was error in the application of the law from the beginning to the end of the trial. As *Chief Justice* McBride said in *State* v. *Rader,* 62 Or. 37, 124 Pac. 195: "No good finding of fact can be predicated on illegal evidence."

But plaintiff is not required to waive any advantage to which it may be entitled by reason of the theory upon which defendants tried the case, and which the court sanctioned by his rulings all through the trial. That theory appears to be that if plaintiff knew, before or at the time of the execution of the contract, the terms of the lease of the lands on which defendants were to grow the hops and that thereby defendants were obligated to deliver one-fourth of the 1919 crop to their

landlord, defendants would be bound to deliver only three-fourths of said crop to plaintiff notwithstanding the definite and certain provisions of the contract to the contrary.

Had plaintiff done nothing more than request a directed verdict in its favor, the court's finding on the question of fact thus suggested would be conclusive, provided there was no error in admitting the evidence (*Beuttell* v. *Magone,* 157 U. S. 154, 39 L. Ed. 654; *U. S.* v. *Bishop,* 60 C. C. A. 123, 125 Fed. 181). But plaintiff did something more and is therefore not within the rule of those cases.

In *Empire State Cattle Co.* v. *Atchison T. & S. F. Ry. Co.,* 77 C. C. A., 601, 147 Fed. 457, both parties requested a directed verdict, and plaintiff in addition asked that other instructions directed to particular features of the case be given to the jury. The trial judge denied the requests and directed a verdict for the defendant. On review it was contended that by submitting the requests for special instructions plaintiff showed its purpose not so to invoke the action of the court that it would thereafter be precluded from going to the jury. After pointing out that there was some warrant for the contention in some of the cases, the court held (Sanborn, *Circuit Judge* dissenting), that where both parties invoke the action of the trial court by requests for a directed verdict, and the request of one of them is accompanied or followed by requests for other instructions to the jury, such other requests do not, by themselves, amount to a withdrawal of the one for a directed verdict.

On certiorari, the Supreme Court (same case, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70), held that where both parties request a peremptory instruction *and do nothing more,* they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them. "But nothing in that ruling," said the court, speaking by *Mr. Justice* White, "sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury where the evidence is conflicting, or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell* v. *Magone* by causing it to embrace a case, not within the ruling in that case made." The court then cites, as upholding the view thus stated and as pointing out the distinction between the case before it and the case under consideration in *Beuttell* v. *Magone*. the opinion of *Circuit Judge* Severens in *Minahan* v. *Grand Trunk Western R. Co.,* 70 C. C. A. 463, 138 Fed. 37, 41, and quotes with approval from the concurring opinion of *Circuit Judge* Shelby in *McCormack* v. *National City Bank,* 73 C. C. A. 350, 142 Fed. 132, where, in referring to the *Beuttell* v. *Magone* case he said:

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict regardless of the evidence on which he relies in the first place. It cannot be that

the practice would not permit him to ask for peremptory instructions, and if the court refuses, to then ask for instructions submitting the other question to the jury."

The court then held (210 U. S., pp. 9-10) that "the action of the trial court in giving the peremptory instructions to return a verdict for the railway company (defendant) cannot be sustained merely because of the request made by both parties for a peremptory instruction, in view of the special requests asked on behalf of the plaintiff. The correctness, therefore, of the action of the court in giving the peremptory instruction depends not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff."

The rule was approved and followed by this court in *Southern Pac. Co.* v. *U. S.* 137 C. C. A. 584, 222 Fed. 46, and is the settled practice elsewhere.

Farmers & Mer. Bank v. Maines, 105 C. C. A. 329, 183 F. 37.

Pensacola State Bank v. Mer. & Farm. Bank, 180 F. 504.

In re Iron Clad Mfg. Co., 116 C. C. A. 642, 197 F. 280.

Breakwater Co. v. Donovan, 134 C. C. A. 148, 218 F. 340.

Charlotte Nat. Bank v. Southern Ry. Co., 103 C. C. A. 261, 179 F. 769.

Chesapeake & O. R. Co. v. McKell, 126 C. C. A. 336, 209 F. 514.

A. C. Bishop, a brother of one of the defendants, testified that he stated to plaintiff's officers in Chicago, between January 10th and 15th, 1917, that his brother's hop yards were leased on crop-rentals of one-fourth, and that he wired his brother that plaintiffs were interested in contract hops (69-71). It was after receipt of this telegram that defendants effected the lease with Hop Lee and prepared the contract for plaintiff's acceptance (48, 52, 56-57). In his final decision the court assumed that A. C. Bishop telegraphed the information of Magnus' knowledge of the amount of the landlord's interest in the crop to Bishop Bros. (92-93); but the testimony does not support the assumption. A. C. Bishop says: *"I immediately wired my brother telling him that they* (Magnusses) *were interested in some term contracts"* (70); and again: *"I wired him I was leaving for home that evening, and that Magnusses were interested in term contracts and to take it up direct."* (72.) W. J. Bishop says: "My brother wired me in January, 1917, that Magnus was interested in three year, or term contracts, and to take it up direct; he was coming home" (48). The testimony of August Magnus, president of plaintiff corporation, was taken by deposition long before the trial. He testified in substance that at the time

plaintiff executed the contract in suit he knew that the land on which the hops were to be grown by defendants was leased, but knew nothing of the terms and conditions of the lease, nor whether it was for crop rent or cash rent, nor the amount thereof; and that there was no mention of sellers' share, or three-quarters of the crop (84-85). In referring to the cross-examination of this witness (87), the court remarked in the presence of the jury: "Magnus himself has contradicted himself in the testimony he has given here. I mention one particular only. He testified in his examination in chief that he knew that the crop was to be produced from leased land; but on cross-examination he testified as follows:

'Q. His land was leased? A. So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease.' So that there is a very plain contradiction in his own testimony" (92).

With all due respect, this is, we submit, disingenuous and not fair to the witness. His testimony as a whole does not justify the interpretation which the court, usurping the functions of the jury, assumed to place upon it. It seems fairly obvious that the witness, having stated on his direct examination that he knew the lands were leased—indeed, the contract itself so recites—meant, and by reasonable intendment, in view of his positive statement on direct examination, said, in his answer above quoted, that plaintiffs, although knowing that the lands were leased, knew nothing of the *terms* of the lease—know nothing of the *details* of it. His answer

was an abbreviated restatement of what he had said on direct examination and at least is in sufficient harmony therewith to render the court's strictures unmerited.

At all events, here was a conflict in the testimony between the most important witnesses on each side. If there was any merit in the court's view that plaintiff's knowledge of the terms of the lease, and especially of the provision for one-fourth crop rental, operated to limit defendants' obligation under the contract sued on to three-fourths of the crop instead of all of it, then the conversation between A. C. Bishop and August Magnus at Chicago becomes the crucial point in the case. It is nowhere claimed that plaintiff was put on notice otherwise than by what A. C. Bishop said, and the latter somewhat weakened his evidence on cross-examination, for he there says: "I did not mention 60,000 or 80,000 or 40,000 or any other number of pounds, I just asked him (Magnus) if he was interested in some term hops. That is all I said about that specific thing or these particular yards. I didn't mention any yards in particular. I mentioned the yards that Orey and Bishop were running, without specifying any number of pounds from any particular yards, either separately or in the aggregate. After we got finished talking I told him that the ones I represented leased the yards. He asked me how we leased the yards. I told him we paid crop rents. *I think* he asked me how much and I told him one-quarter. Nothing was said about getting the hops belonging to the owner of the land" (73).

In this state of the record the court further said:

"It is well known to the plaintiff in this case, as well as the defendants, that defendants were lessees of the lands upon which this crop was to be grown, *and it is presumed that the buyer knew that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest*" (96). The first clause of this statement is correct, but why fall back upon a presumption involving a non-sequitur to establish a result which had already been foreclosed when the court found that A. C. Bishop told the truth, as against plaintiff's denial that the buyer knew any such thing? (92). Is this a presumption of law or of fact? Can it be said *as a matter of law* that all hop leases are made on crop rentals on the basis of three-fourths to the grower and one-fourth to the landlord? Where has it ever been so held? If it is a presumption of fact, then its utterance by the court is out of place because it was for the jury to say from the evidence whether such fact existed, and there was no evidence offered in this trial on that subject.

On the only possible theory upon which an instructed verdict for the defendant in this case can be predicated the court necessarily had to find *as a question of fact on conflicting evidence* that plaintiff knew the terms of that lease when the contract was signed. Such finding necessarily involved a *weighing of testimony and a consideration of the credibility of witnesses*—a witness for the plaintiff against a witness for the defendant; because there was no other testimony on the point and the presumption was against the fact because it was absent from

the written agreement. Suppose the case had been left to the jury under the special instruction requested by plaintiff, and the jury had found that plaintiff did not know the terms of the lease? This would have meant that they believed Magnus and did not believe Bishop. Could the court have set aside that verdict because he had formed a different opinion of the witnesses and had preferred to believe one and not the other?

These are matters outside of the province of the judge in the trial of an action at law to a jury. On the question of fact thus passed on by the court the evidence cannot be said to be meagre on either side. It was for the jury to pass upon the alleged contradiction in the testimony of a witness and to weigh the evidence pro and con. The direction of a verdict in such circumstances is a plain invasion of the rights of a litigant secured by the VII amendment of the Federal constitution. In all trials the jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and must be left to the free exercise of their functions. Whether the evidence be weak or strong, it is their right to pass upon it; and it is not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law (*Hickman v. Jones,* 9 Wall. 197, 19 L. Ed. 557, 563; *Aetna Life Ins. Co. v. Ward,* 140 U. S. 76; 35 L. Ed. 371; *Coulter v. Thompson Lumber Co.,* 74 C. C. A. 38, 142 Fed. 708).

Not the least remarkable feature of the court's final

remarks at the trial of this case, and its ruling upon the special request tendered by the plaintiff (100), is the statement that the conflicting testimony on a question of fact is a "question for the court, because it is offered solely for the purpose of aiding the court in interpreting the contract." In its final analysis, this can only mean: "This contract is ambiguous and requires interpretation; I cannot interpret it without the testimony of A. C. Bishop on a question of fact; to accept the testimony of A. C. Bishop I must first find that the conflicting testimony of plaintiff's witness is untrustworthy; having judged of the credibility of the two witnesses and weighed their testimony, I decide the disputed fact in favor of defendants and therefore am able to interpret the contract and say that its meaning is other than its language imports." In short, sitting as a court of equity the same judge had decided two days previously that the contract could not be reformed; that defendants could not be permitted to interpolate into the instrument which they themselves had written, *"the sellers' share* of the crop to be raised"; yet the same judge presiding at the trial in an action at law on the contract thus denied reformation, reformed the contract under the pretense of interpretation by interpolation of the identical provision which, as an equity judge, he had denied. Thus was accomplished the reformation of a written contract on the ground of a *unilateral mistake, in a law action tried to a jury, without an issue in the pleading for that purpose, the court passing on the credibility of the witnesses and the weight of the testimony!* Defendants took

themselves into a court of equity where they rested their affirmative defense solely on the ground that they and plaintiff had made a mistake in not having the written contract say, "their share, or three-fourths of the crop," instead of all of it. That court held the plaintiff made no mistake, and dismissed the answer. Then on the law side, before the same judge, with no amendment to the pleading which equity had emasculated of all of its virility, defendants were permitted to offer evidence that plaintiff, although having made no mistake in executing the contract, knew in January, 1917, that defendants' lease called for the delivery in 1919 of one-fourth of the crop. Plaintiff's witness denied any such knowledge, but the court accepted defendants' version and decided "all the parties being advised of the situation under which this lease was made, then it would be perfectly reasonable and natural to read this contract as that the sellers had sold 60,000 pounds of the crop to be raised and grown by them; that is to say, of their share in the crop to be produced; and I think that is a reasonable construction of the contract" (96). In partial support of this conclusion the court found that in normal years the yards in question had a productive capacity of 80,000 pounds, whereas, the testimony of defendants themselves was to the effect that only once in five years had the yards produced that quantity (half of which was guessed at as only 40,000 pounds were picked that year), and the average annual production for five years previous to the trial was 40,000 to 60,000 pounds a year (65, 76, 77).

Thus defendants, without asking for it in their pleading, were freely granted at law the relief which they had asked for in equity but had been denied. The case is *sui generis.* We find only two reported decisions in which the situation is at all analogous.

In *Pitcairn v. Philip Hiss Co.,* 61 C. C. A. 657, 125 Fed 110, 114, where the lower court had defeated an attempt to accomplish a somewhat similar result, it was held that, according to the modern view, the rule which prohibits the modification of a written contract by parole is a rule of substantive law, and not of evidence, and the appellate court further remarked: "The court simply held that the writings were to be taken as constituting the agreement, and that extraneous evidence could not be resorted to, to modify it. No error was committed in so applying the familiar rule. *Whatever be the case in other jurisdictions, in a federal court a written contract cannot be reformed on the trial of an action at law, and disguise it as we may, that is what the attempt to make effective the evidence in question plainly amounted to.*"

In *Prudential Casualty Co. v. Miller,* 168 C. C. A. 458; 257 Fed. 418, it appears another attempt to enlarge the jurisdiction of a federal court in a law action had been more successful in the lower court. There, as here, the question was whether one of the parties had been informed of certain facts prior to entering into a written contract, but there, *not* as here, the question had been left to the jury. On review the appellate court said:

"We need not determine whether the insurance com-

pany, prior to the issuance of the rider, was misinformed by Allen as to the extent of the alarm system installed, or as to whether he underook to waive the nonconnection of the safe with such system, or as to whether the minds of the parties in interest ever met as to the purpose to protect and the actual protection of the safe. If Allen and Miller, or his agent, so misunderstood each other that their minds never met as regards the extent of the store's equipment, or if Allen through mistake or designedly misinformed the insurance company as to its extent, or if he undertook to waive the failure to connect the safe with a burglar alarm system, and thus exceeded his power, a situation was presented which a court of law could not correct. Correction, if desired, must be obtained in a court of equity, after which the actually existing contract between the parties as thus determined can be enforced. If the insured can prove that he made a different contract from that expressed in the writing, he can, on making sufficient proof, have it reformed in equity; but he cannot accept his policy without reading it, and in an action at law upon the instrument ignore one of its provisions and have it enforced otherwise than according to its terms. *A jury may not thus reform a policy by striking out one of its clauses.*"

What has been said in the discussion herein under the topics, Pleadings, Law of the Case and Evidence is applicable to the error assigned to the refusal of the court to direct a verdict for the plaintiff, and in directing verdict for the defendants. Without the evidence referred to in the first and second specifications of error there remains nothing but admitted facts and one fact

not disputed by any testimony to the contrary. The evidence on the part of the defendants admitted over plaintiff's objections, was, as has been sufficiently shown, no evidence at all. Where there is no competent evidence tending to support a verdict for the defendant, and where plaintiff's case is clearly made out and the only defense attempted to be proved is not pleaded, a direction in favor of the plaintiff must follow (26 R. C. L. 1073).

The judgment below should be reversed for error of law; and as there is no dispute about the facts entitling plaintiff to recover, a judgment should be rendered in this court instead of remanding the cause for a new trial (*Fellman v. Royal Ins. Co.*, 106 C. C. A. 557, 184 Fed. 577, 581; *Walker v. Gulf & I. Ry. Co.*, 269 Fed. 885, 891 (C. C. A.); Simkin's Fed. Suit at Law, p. 223). If the contentions of plaintiff herein are sound there would remain nothing to retry.

Respectfully submitted,

BAUER, GREENE & McCURTAIN,
For Plaintiff in Error.

No. 3905

United States
Circuit Court of Appeals
For the Ninth Circuit

A. MAGNUS SONS COMPANY,
a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

Brief for the Defendants in Error

Upon writ of Error to the District Court of the United States for the District of Oregon,
Honorable Charles E. Wolverton,
District Judge.

DEY, HAMPSON & NELSON,
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KUBLI-HOWELL CO., PORTLAND, ORE.

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STATEMENT.

(The numbers in parenthesis throughout this brief, unless otherwise stated, refer to pages of the Transcript of Record).

This is an action at law to recover damages for an alleged breach of contract involving the interpretation of a grower's contract for the sale of hops, and a determination of the question as to whether the defendants, the sellers in this contract, have performed their obligations thereunder.

A grower's contract is one which has a technical meaning in the hop business. It is a contract which provides for the sale of an estimated quantity of hops to be grown on a specified piece of ground, but under which the grower and seller is obliged to deliver that quantity only actually produced from the land specified in the contract. In this respect it is different from a dealer's contract, which provides for the sale of a definite quantity of hops, irrespective of the person by whom or the place on which such hops are produced. (59, 60, 61, 77, 78, 79.)

The contract in question provided for the sale of "sixty thousand (60,000) pounds of hops of the crop to be raised and grown by the seller in the following year 1919, on * * * forty-five acres of land * * * known as the Hop Lee Ranch." In the contract it was stated "the seller represents to the buyers, that they lease the above described property." The contract price of the hops was eleven and one-half cents per pound (later increased by agreement on the part of the plaintiff to sixteen cents). At the time of the alleged breach the market price of hops was eighty-five cents a pound, and plaintiff now seeks a judgment for alleged damages in the sum of $6628.83, being the difference between the contract price of sixteen cents per pound and the market price of eighty-five cents per pound, of 9,607 pounds of hops, to the delivery of which it contends it was entitled.

There is no dispute about the fact that 38,429 pounds of hops constituted the crop grown on the premises described in the contract during the year 1919, and that

of this crop defendants delivered to the plaintiff 28,882 pounds only, and to Hop Lee, the landlord of the defendants, 9,607 pounds, his share of the crop under the leases providing for a crop rental to Hop Lee, from which leases the defendants derived their right to operate the yards.

The questions before this court are not the narrow technical ones suggested by the plaintiff, but the broad one as to whether the contract contained any obligation on the part of the defendants which they failed to perform.

In order that this question may be answered correctly in this court, as it was answered correctly in the lower court, it seems necessary to amplify to some extent the statement of the case set forth in the brief of plaintiff in error.

In December of 1916, A. C. Bishop, a brother of one of the defendants, employed as a salesman, (68) made a trip East for the purpose, among others, of arranging contracts for the sale of hops to be grown on yards of the defendants, W. J. Bishop and Adam Orey (69). These yards were known as the Chung and Stevens yards (48) and at the time the contract in question was executed, were owned by a Chinaman, Hop Lee (48). Orey and Bishop had a written lease on the Chung yard covering the period from 1915 to 1919 (49-50) and, before executing the contract with the plaintiff, and in order to be sure of the continued right to operate the Stevens yard, changed the then existing oral lease on

that yard into a written lease (52 and defendants' Exhibit 1, (52-56, inc.). This lease provides for the delivery to the lessor, Hop Lee, of "one-fourth of all hops produced from said real premises each year during the life of this lease" (55), and the lease on the Chung yard also provided that "Hop Lee was to get one-fourth of the hop crop and we (the defendants) were to get three-fourths of the crop each year." (50)

While in Chicago, A. C. Bishop saw "three of the Magnusses" (69) and "asked them if they were interested in contracts." (70) At that time he told them (the Magnusses) that his brother's yards were leased (70-71). He also told them (the Magnusses) that "we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals" of one-quarter of the crop. (71) After this conversation A. C. Bishop communicated to his brother the fact that the plaintiff was interested in term contracts and instructed his brother, W. J. Bishop, to handle the matter direct. (72)

It is not disputed that Hop Lee owned the yards mentioned in the contract; that he leased them to the defendants during the contract period; that the rental reserved to him in the leases was one-quarter of the crop; that Hop Lee in fact received his one-fourth of the crop, which he sold to others and that he never sold any hops to the defendants. (74)

As a result of the information communicated to him by A. C. Bishop from Chicago, that the plaintiff was interested in purchasing hops under contract, W. J. Bishop sent the following telegram to the plaintiff:

"McMinneville Org 23 Stamped

1917 Jan 24 AM 1 15

A. Magnus and Sons
Randolph Chicago Ill

We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before. Wire direct

Bishop Bros." (58)

To this telegram the plaintiff sent the following answer:

"Chicago, Ill, January 24, 1917.

Bishop Bros.
McMinneville, Oregon.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and a half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company." (62)

In due course and after defendants had negotiated the written lease with Hop Lee on the Stevens yard (the lease is dated January 24, 1917 (52) and the contract is dated January 26, 1917 (6) W. J. Bishop forwarded the contracts in duplicate to the plaintiff, accompanied by the following letter:

> "Inclosed find contracts for 3 years for 60,000 lbs. on the Chinaman's yards we are running. Kindly sign duplicates and forward back to us. You can use your own judgment about recording them, if you want you can save that expense. We have sold both to Rosenwald and Hugo Lewi several years and they saved the expense. Contracting is active. Wolk Hop Co. took 40 thousand from Geo. Yergen at 11½ and have offered this and 12 to several growers. Other dealers are offering 11 all for one year.
>
> Bishop Bros." (66)

There was a crop shortage in 1919, due to the fact that hops were left on the vines in 1918, which ruined the yards. (65) The three-fourths of the crop delivered to the plaintiff, being materially less than the estimated quantity it had expected to receive, and the skyrocketing of price making it to its interest to demand delivery of the hops produced and owned not only by the defendants but also by the defendants' landlord, Hop Lee, it is now urging a construction of the contract which will entitle it to damages because of the refusal of the defendants to deliver to it at sixteen cents per pound 9,607 pounds of hops, which, in order to get, they would have had to buy

in the open market at eighty-five cents per pound. (123)

The original answer was attacked by certain motions to strike, and by demurrers to certain affirmative pleas. These matters were heard by District Judge Bean. It is only fair to say that if his opinion is accepted literally it shows a different view, on his part, of the contract under consideration than that entertained by District Judge Wolverton. Plaintiff in error makes the point that Judge Bean held the contracts to be definite, certain and unambiguous, and that therefore there existed no necessity for the court to ascertain the facts and circumstances which surrounded the parties at the time they entered into this contract in order to ascertain the true meaning thereof. Upon the trial of the case on its merits, however, Judge Wolverton entertained a different view. That his view was not essentially different from that of Judge Bean and that the inconsistency in their attitude is apparent rather than real, is indicated by the observation of Judge Wolverton when objection was interposed by the plaintiff in error to evidence being received which would tend to disclose the facts and circumstances surrounding the execution of the contract. We allude to his remarks (43) as follows:

> "I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say, further, I have consulted with Judge Bean about it, and I am of the opinion that that decision does not decide the exact question that is now before us."

Irrespective, however, of any question as to whether the views of Judge Bean and Judge Wolverton, with

respect to the proper interpretation of this contract, were the same or were in opposition, the fact remains that after Judge Bean had stricken from the answer of the defendants those parts of their pleadings which he deemed immaterial, an issue still remained as to the proper interpretation to be placed upon the contract by virtue of that part of paragraph II of the answer which remained after the motion to strike had been allowed.

The paragraph is as follows:

> "Admit that the defendants executed the contract annexed to the complaint and marked Exhibit "A" but deny that defendants sold to plaintiff thereby or otherwise 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive out of the crop grown on said lands." (13)

This denial placed squarely before the trial court the issue and the only issue that ever existed or that now exists on the law side of this court, namely, the question as to the true interpretation to be placed upon the contract with respect to whether the contract obligated the defendants to deliver all of the hops grown on the premises described therein or the hops grown thereon, less the share required to be paid by them to their landlord, Hop Lee, for crop rental.

The views of Judge Bean were such, however, that the defendants deemed it advisable, without abandoning

their contention as to the true interpretation of the contract, which they have maintained at all times on both the law and the equity sides of the court, to seek a reformation of the contract in equity so that the uncertainty existing because of its ambiguous provisions could be rendered certain, and the intent of the parties to provide for the sale of only the hops grown and owned by the defendants, placed beyond controversy. An appropriate plea for reformation of the contract on the ground of mistake was interposed by the defendants and a trial had upon the equity side of the court. At the conclusion of this trial reformation was denied by Judge Wolverton upon the sole ground that any mistake shown to have existed was a mistake upon the part of the defendants only. But *non constat* because there was no mutuality in mistake, the contract is unambiguous, as plaintiff in error contends. Because, in the opinion of Judge Wolverton, the contract, as written, is ambiguous and required extrinsic aids for its proper interpretation, the case was continued for further trial as an action at law and the judgment entered therein from which this appeal has been taken. That the judgment in favor of defendants so entered was proper will be developed by the argument hereinafter set forth.

ARGUMENT.

Defendants in error will first discuss the only points of law presented by plaintiff in error in this case, and attempt to show that they in no way control its proper determination, and thereafter suggest to the court the true legal principle by which the learned trial court was

guided in its determination, and which it is believed this court will follow in reviewing the judgment here on appeal. To the complaint of plaintiff there was attached, as an exhibit, the contract which forms the subject matter of this controversy. This contract therefore became an essential part of plaintiff's case, which it was the duty of the court to construe for the guidance of the jury in the event it became necessary to submit to the jury for determination any issue of fact. The contract so before the court was not the contract of which the plaintiff attempted to state the legal effect in paragraph IV of its complaint, but the contract as written by the parties, as said contract was attached to the complaint as Exhibit "A". Had the defendants, therefore, admitted every material fact pleaded by plaintiff in its complaint, it would still have been the duty of the court to construe the contract and determine therefrom, in view of the established facts, whether the plaintiffs had performed or failed to perform their obligations. Plaintiff in error contends, at page 11 of its brief, that only three issues remained for trial, first, as to the quantity of hops grown, second, as to the conversion of part thereof by the defendants, and third, as to the market value of hops at the time of delivery. It points out, at page 12, that a stipulation was entered into covering the quantity of hops grown and the amount delivered, and that the testimony with respect to the market value was undisputed. Under this analysis of the pleadings it concludes, to its own satisfaction, that there was no issue before the court to be tried, and there remained only for the court to direct a verdict in its favor.

Its analysis of the pleadings, however, is defective in that it ignores the fact that a contract was before the court, that it was the duty of the court to construe such contract, and therefrom to determine whether, conceding the other facts to be beyond controversy, the defendants had performed or failed to perform their obligations to the plaintiff. Introduction of testimony to enable the court, in the fulfillment of the duty imposed upon it, to construe the contract, was not error therefore under the rule of the "law of the case," as will be hereinafter pointed out, nor because there was nothing in the pleadings justifying such admission, since the contract was in the pleadings, and not only justified but necessitated the admission of the testimony which the court in fact received. Nor was the admission of such testimony precluded by the third reason mentioned on page 16 of the brief of the plaintiff in error, namely, that it is the duty of the court to declare the meaning of a plain, certain and unambiguous contract without the aid of extrinsic evidence. It is the duty of the court to declare the meaning of *every* contract and of the jury to be bound by the determination of the court as to the meaning thereof. This contract, as will be hereinafter developed, was not plain and certain but was ambiguous, and to assist in determining the ambiguity thereof, the court heard and was guided by the testimony, of the introduction of which plaintiff in error complains.

The next section of the brief of plaintiff in error is devoted to a consideration of the principle of "the law of the case." Under this it urges that District Judge Bean had construed the contract in accordance with the con-

struction placed thereon by the plaintiff, that Judge Wolverton was precluded from any further examination of the matter, and therefore, as we understand the brief, that this case must be reversed and a judgment entered in favor of the plaintiff, not because Judge Wolverton was necessarily wrong but because his views were inconsistent with those of Judge Bean, and Judge Bean's views were expressed first in point of time.

We concede it to be "a principle of general jurisprudence", as pointed out by Judge Sanborn in Shreeve vs. Cheesman, 69 Fed. 785, cited on page 21 of the brief of plaintiff in error, "that courts of concurrent or coordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action." But we call the attention of counsel for the plaintiff in error to the observation of the same learned judge set forth on page 792 of that opinion, to the effect that "the object of the trial of lawsuits is to reach just decisions, and to thereby preserve and protect the rights of litigants." The principle of "the law of the case" is *always* a rule of practice and *may be* a rule of property. In the case at bar it could have no possible significance except as a rule of practice. Were it necessary, and were it the fact, it could be conceded that Judge Bean had laid down a rule of practice from which Judge Wolverton found it necessary to depart, but that concession would not relieve this court from the duty of determining the case upon its merits, irrespective of any technical rule of procedure. Morrow, Circuit Judge, at page 939 of the opinion in the case of Presidio Mining Co. vs. Over-

ton, 261 Fed., cited by the plaintiff in error at page 24 of its brief, not only made the statement, which is quoted and emphasized by their own italics by counsel for plaintiff, at page 25 of their brief, but he added the further observation, pertinent to the matter before this court:

> "The questions involved in this appeal will, however, be determined upon their merits, as they appear in the whole case, and not upon any technical rule of procedure. But we may properly inquire how far the insufficiency of the original complaint has been overcome by amendments, supplemental allegations and proof. By this method we shall come to a clear understanding of the present controversy and how it has developed from the original complaint."

It is to be noted that this Circuit Court of Appeals does not consider itself bound by a matter res judicata in the lower court as between different judges thereof, or by the rule of practice or procedure denominated generally "the law of the case." It considers such matters for the purpose of reaching just decisions "upon their *merits* as they appear in the whole case." It does not consider itself foreclosed by the chronology of a determination of an issue made in the lower court and discusses the decisions therein made only for the purpose of reaching a clear understanding of the final issue to be determined.

The so-called "law of the case" therefore, upon which plaintiff in error places so much reliance, is of no im-

portance in this controversy if it be established that the contract here under examination was ambiguous and required parol testimony to enable the court to determine the intent of the parties thereto.

Proceeding to a discussion of the evidence, we concede it to be a judicial platitude, as mentioned at page 28 of the brief of plaintiff in error, that evidence must conform to the pleadings and be relevant and material to some fact in issue. It has already been pointed out that this contract was before the court, and plaintiff in error concedes (by necessary implication) by the statement set forth at page 16 of its brief, that the trial court did not err in admitting testimony of conversations and negotiations of the parties prior to and at the time of the execution of the contract, for the purpose of "enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into," if the contract sued upon in this case is uncertain or ambiguous. The authorities cited and the argument advanced with respect to the alleged errors on account of the introduction of evidence are based upon the assumption made by plaintiff in error in its own favor of the only issue in the case tried in the lower court, or here required to be tried on the appeal. We concede that if the contract is unambiguous the lower court erred, but we fail to find in the brief of plaintiff in error any suggestion that this contract is without ambiguity, save only the bald statement or assumption in which it indulges to that effect and the implicit reliance it imposes upon the decision of Judge Bean on questions of preliminary pleading.

The third principle of law relied on by plaintiff in error is that stated in the case of Empire State Cattle Co. vs. A. T. & S. F. Ry. Co., 210 U. S. 1, wherein the rule is laid down that the trial court cannot be sustained in a peremptory instruction to return a verdict for one party merely because both parties requested a peremptory instruction, if one of the parties coupled such requested instruction with a further request for a submission of the case to the jury upon an issue created by a conflict in the evidence and under circumstances where the court would not be justified in setting aside the verdict of a jury because of lack of substantial dispute in the evidence. This is the only principle of law urged by the plaintiff in error in this case, which has any possible bearing upon the decision of this court. The fact that it is suggested at all by plaintiff in error shows its own lack of confidence in the other principles relied on and in the construction of the contract urged by it, for if its construction of the contract is sound (a matter about which it has little to say) it would have been as much error for the learned trial judge to submit the suggested, or any question of fact, to the jury for determination as it is contended to be error for it to have directed a verdict for the defendants and to have refused to direct a verdict for the plaintiff.

The issue of fact, because of the non-submission of which to the jury the plaintiff in error finds itself aggrieved, is as to whether "A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land," and also as to whether A. Magnus Sons

Company "did not know the terms and conditions of that lease." The first of these questions, defined by the requested instruction (Exception No. 31) (99) is absurd, for the contract itself expressly recited that "the seller represents to the buyers, that they lease the above described property," and there was never any contradiction of the fact that the defendants did lease the premises, and that this fact was known to the plaintiff.

The second point, as to whether the plaintiff knew the terms and conditions of the lease, i. e. that the defendants were required to pay one-quarter of the crop as rental to their landlord, is more nearly debatable, but in view of the wise rule that prevails in the Federal Court as to the power and duty of the judge in controlling the action of the jury in determining an issue of fact, and in view of the undisputed facts in this case, by which either court or jury would necessarily be bound, we believe that Judge Wolverton was correct in refusing to submit the case to the jury under the requested instruction, although he may perhaps have inadvertently erred in the reason assigned for his refusal, set forth at page 100 of the transcript.

It will be noted that A. C. Bishop testified that when he was in Chicago he "saw three of the Magnusses". (69) "I went in there with the intention of selling *them* some spot hops—I think I did; and also asked *them* if *they* were interested in contracts, which *they* were, at the present time. By 'them' I mean the Magnusses." (70) In answer to the question as to whether there was any conversation in regard to the ownership of the yards,

the witness testified: "Yes, sir. I told *them* the yards were leased." (71) In answer to a question from the court as to whether the witness told *them* the terms, he answered: "Yes, sir." (71) The following examination then took place:

Q (By Mr. Hampson) What were the terms as you told them?

A I told *them* specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals.

Q For how much rent?

A One-quarter rental.

In what way was this testimony disputed so as to necessitate or justify a submission of any issue of fact to the jury? Plaintiff in error relies solely upon the testimony of August Magnus. It is true, as pointed out by plaintiff in error, at page 45 of its brief (although this fact does not appear from the bill of exceptions) that his deposition was taken long before the trial. It is equally true (although this fact does not appear from the bill of exceptions) that the order for the taking of the testimony of August Magnus provided for the taking of the testimony of Albert Magnus, and the testimony of Albert Magnus was never taken. It provided for taking the testimony of G. G. Schumacher, and the testimony of the said Schumacher was taken, and he later appeared in person and was offered by plaintiff in error as a witness in its behalf in the trial of this case,

and while the testimony of August Magnus was taken "long before the trial" it was taken with respect to the specific issue, as to the intent of the parties in regard to the hops to be covered by the contract, raised by the pleadings on the equity side of the court, in which the defendants sought, and needlessly sought, reformation.

How did August Magnus, if at all, contradict A. C. Bishop? On direct examination, referring to A. C. Bishop, he testified "*We* had a conversation with him on the subject of hops generally, but not in reference to the subject matter of the contract." (83-84) Later, in answer to the question, "At the time this contract, which has been received in evidence, was executed, did you have any knowledge as to whether the defendants owned this land or whether the land specified in the contract was leased land?"

A It was leased land. (84)

Q Did you know anything about the terms and conditions of that lease?

A No.

Q Did you have any knowledge that the lease provided that the defendants were to have as their share three-quarters of the output of hops, and that the landlord was to have one-quarter as his share?

A No. (85)

But on cross examination, in answer to the question

"His land was leased?" the witness testified: "So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease."

As the learned trial judge clearly pointed out, there was very plain contradiction by the witness in his own testimony and this is more conspicuous in view of the fact that the witness, A. C. Bishop, testified that his conversation was with *three* of the Magnusses, that August Magnus gave the only testimony offered by the plaintiff in error on this branch of the case, that plaintiff in error, although it conceived it to be necessary to take the testimony of Albert Magnus, for reasons known alone to it, did not offer him as a witness, that it produced in person the witness Schumacher (whose testimony, abstracted at pages 80 to 93 of the transcript is not germane to any issue in this case) and failed to produce any one of the three Magnusses with whom the witness A. C. Bishop negotiated this contract, and who were peculiarly fitted to testify with respect thereto.

In view of these circumstances we contend that there was no issue of fact that the court was required to or even justified in submitting to a jury for its determination, and that had the court, by inadvertence, submitted the case to the jury under the instruction tendered by the plaintiff in error, and had the jury returned a verdict for the plaintiff in error, upon the state of the record having been brought to the attention of the trial court, it would have become his duty to set that verdict aside.

But should this Appellate Court arrive at a contrary conclusion and hold that the trial court erred in deciding

this question, rather than in submitting it for decision to the jury, it must necessarily remand the case for a new trial with directions to the trial court to submit such question of fact for decision to a jury under appropriate instructions. The illogical consequences of its own argument plaintiff in error apparently fails to perceive, obvious as they are. In one part of its brief it says the lower court erred and this cause should be reversed because that court determined an issue of fact which should have been submitted to the jury, and at the conclusion of its brief it asks this court to render a judgment in favor of the plaintiff in error without remanding the cause for a new trial. In other words, it asks this court, to do, only in a different way, that which it says it was error for the trial court to do, namely, decide as a matter of law that which is essentially a question of fact.

Having disposed of the fictitious issues and the inapplicable principles of law with which the plaintiff in error has attempted to create confusion and distract attention from the real issue in this case, the defendants in error now submit to the court for consideration the principle and undisputed facts by which it is believed the court will be guided in its determination of this controversy.

The defendants in error in this case do not dispute the principle that parol testimony is inadmissable to vary or contradict the plain meaning and effect of a written contract. A recognition of the existence of this principle, however, is not a concession that it has any application to the case at bar. It is equally elementary that when the meaning of a contract is doubtful or ambiguous, that ex-

trinsic proof is admissible to ascertain the intent of the parties. The contract under consideration is ambiguous. If there was a real inconsistency between the view of this contract adopted by Judge Bean and the view entertained by Judge Wolverton, instead of an apparent inconsistency only, then it is our view that Judge Bean was wrong and Judge Wolverton right, but we hold that the inconsistency was apparent and not real, and this is a view which was taken by Judge Wolverton, who, after discussion of this case with Judge Bean, announced that his rulings did not depart from the requirements laid down by Judge Bean at the time of announcing his decision on certain of the preliminary pleadings.

Be that as it may, the purpose of the trial of a lawsuit is to accomplish justice and in arriving at that result this court will not be embarrassed by any inconsistency in the views of this case that may have been entertained by the learned trial judges who had different aspects of the matter before them for consideration, whether such inconsistencies be apparent only or real.

If the contract is ambiguous Judge Wolverton did not err in admitting the oral testimony which he heard for the purpose, and only for the purpose, of ascertaining the facts and circumstances which surrounded the parties at the time they entered in this contract, in order that he might properly interpret the contract and determine the true intent thereof. If the contract is precise and certain and has the meaning to which the plaintiff in error ascribes to it, Judge Wolverton did err in receiving

the parol testimony, and the assignments of error on this aspect of the case are well taken.

It is worthy of note, however, that in the brief the plaintiff in error presents to this court, the only principles of law relied on by it are those which the defendant in error concedes to be true, and that in its argument of this case plaintiff in error has filed a brief which assumes here, as it assumed in the lower court, the very controversy before the court for decision.

We hold that a contract containing the phrase "hops of the crop to be raised and grown by the seller on the following described property", in view of a definite recital contained in the contract that the premises are leased by the sellers, is ambiguous, in that it may refer either to the crop grown on the premises in question, to which the growers may be entitled by reason of their farming of the premises (the construction of the contract adopted by the lower court), or it may refer to the entire crop produced on the premises (the construction suggested by the plaintiff in error in the lower court and here assumed, without argument, to be correct.) In construing a contract, as has often been said, the courts will take a document by its four corners and give force to every clause that may aid in throwing light upon the matter to be decided. If, as counsel for the plaintiff in error suggests, the contract is without uncertainty and provides for the sale of a maximum quantity of hops to be produced upon a definite tract of land, irrespective of whether the sellers own said hops, wherein lies the reason for the phrase "to be raised and grown?" Wherein

lies the necessity for any reference to the fact that the premises were leased? Simplicity and certainty would have been accomplished by merely designating the maximum quantity to be sold and the premises on which the hops were produced. That the parties to this agreement had in mind a different stiuation, and that they did not intend to presently sell or to contract to sell something which the sellers did not own, (although they could lawfully so do had they desired, as is suggested in the brief of plaintiff in error) is established by the inclusion in the contract of the phrases above referred to, which, although in a faulty and ambiguous way, do disclose the intent of the sellers to sell and of the buyers to buy only the hops to which the sellers might become entitled upon the conclusion of their season's work by virtue of farming the premises described in the contract. The contract was intended to protect the seller from any obligation to deliver hops which the seller did not own, whether such eventuality arose by virtue of a bad season and a short crop or by virtue of the conceded obligation which existed in this case to deliver a portion of the crop as rental to the landlord, a portion over which the sellers had no more control or right of disposition than they had over hops produced on entirely different land by persons unconnected with this controversy.

The principle of law which controls the decision in this case is so elementary in character that it is a work of supererogation to cite authorities in support thereof. It may, however, serve to lighten the labors of this court to call attention to decisions of other courts in which able counsel have contended that a contract is certain and un-

ambiguous in meaning, and bears the meaning which an interested client has given it, wherein reviewing tribunals have been unable to agree with such contentions, and have sustained the introduction of parol testimony to make certain that which was uncertain.

In the case of Millett vs. Taylor, 26 Cal. App. 162, a contract was before the court for construction, under the terms of which tenants of farm lands agreed to render "a just and true accounting of all of the affairs appertaining to the conduct of said farm, and that they will deliver to said parties of the first part, or to their order, one equal half part of all the proceeds and crops produced on said farm and premises aforesaid." At page 165 of the opinion the court said:

> "A 'one-half equal part of all the proceeds and crops' is, indeed, a vague and indefinite phrase, and we think that the ruling of the trial court, in permitting evidence extrinsic to the instrument itself, for the purpose of ascertaining what the parties intended to express by the use of that language, was not only perfectly proper but absolutely necessary."

The court then proceeded to state correctly the principles of law which will control the decision in this case, in the following language:

> "It is true, and indeed, elementary, that 'it is no part of the office of construction to add to the contract or take from it, but it is to ascertain what the parties intend by what they have said. If there be

no ambiguity in the contract, it must speak for itself,' (citing authorities) but, where, as is certainly true here, 'the language employed being fairly susceptible of either one of the two interpretations contended for, though at variance to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intentions of the parties'."

The court there upheld the introduction of evidence to show that the lessors were entitled to feed stock on the farm from the crops of hay raised thereon, and that the lessees were entitled to use such of the products of the farm, eggs, butter, milk, etc., as they might reasonably require for themselves or for their family use, and that the lessees had performed their contract when they had delivered to the lessors an equal half part of all of the net proceeds and crops produced on said premises, after the gross proceeds had been diminished by the uses to which various parts thereof had been placed in accordance with the intent of the parties.

In the case of Parks vs. Elmore, decided in 59 Wash. at page 584, a contract was under consideration in which one Jas. W. Parks contracted to sell, and Messrs. El-

more & Co. contracted to buy, certain dog salmon, expected to be caught by Parks, at an agreed price per fish, the salmon being designated as "my entire catch." Parol evidence was permitted to be introduced to explain the meaning of the phrase "my entire catch," in connection with which Parks was shown to be a wholesale fish dealer, who did not personally engage in catching fish, through employees or otherwise, but who was required to and did purchase from independent fishermen, quantities of dog salmon in order to procure the higher grade of silver-sides, and that the independent fishermen required the wholesale dealers to purchase dog salmon in order to acquire such silver-sides. The court held that the dog salmon so purchased were identified by the words "my entire catch" and affirmed a judgment in favor of the respondent, predicated upon such parol testimony and such construction of the contract. This was done over the contention of the appellant that the words "my entire catch" have in themselves a fixed definite meaning, and that parol evidence was not admissible to vary their natural sense. The court, however, held that the word "catch" has no such definite meaning as to not admit of explanation under any circumstances. It may mean different things, depending upon the connection in which it is used; "it may mean the fish caught by the fisherman individually, or it may mean those caught by him and his assistants, or it may mean caught by his gear, operated by third persons entirely. So when we speak of the catch of a cannery, the phrase may still have a different meaning; it may mean the fish brought to the cannery, without regard to the persons by whom they were caught."

So in the case at bar the phrase "hops of the crop to be raised and grown by the seller" may mean one thing when the seller is the owner of the land on which the hops are to be grown, and may mean, and as the lower court found did mean, something entirely different when the seller was a lessee of the premises on which the crop was to be raised and grown. And it was because of the fact that the contract is susceptible of these different meanings, that the court was compelled to hear evidence extrinsic of the contract with respect to the facts and circumstances which surrounded the transaction in order to determine correctly the meaning and intent of this phrase as used by the parties to the contract. The evidence so received was properly received, and when the court was in possession of this evidence, it necessarily found that this contract was not intended to be a dealer's contract covering a future sale of hops, which the seller would acquire when and where he might elect in order to be in a position to perform at the time of delivery, but that it was a grower's contract intended to cover the sale of hops controlled by the seller by virtue of his farming operations in connection with a particular tract of land.

In the case of Brown vs. A. F. Bartlett & Co., 201 Mich. 269, the plaintiff was sued for commissions alleged to have been earned by him under a contract which obligated the company to pay him five per cent. "of the receipts of the company on all orders procured by you for machinery, provided such orders are executed and sold at a profit for the company." In this case the plaintiff was permitted to testify that prior to signing

the agreement, the president of the company, in answer to his inquiry as to what would constitute costs, said, "that costs would be made by adding twenty per cent. for overhead to actual cost of labor and material." The defendant made the contention that the word "profits" had a fixed and definite primary meaning, and that the introduction of the parol evidence offered by the plaintiff in that case violated the same rule which the plaintiff in error contends was violated in the trial of the case at bar. The trial court was upheld, and in so doing, the reviewing court quoted, with approval, at page 278 of the opinion, the following rule:

> "The true doctrine seems to be that, while direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances, existing when the instrument was made, may be properly admitted, in order that the court may be placed as nearly as possible in the situation of the testator, or contracting parties, as the case may be, with a view the better to adjudge *in what sense* the language of the instrument was intended to be used, and to apply it to the subject matter."

Authority upon the same subject is to be found in a decision of the Supreme Court of Oregon. In the case of McCulsky vs. Klosterman, 20 Ore. 108, the court had under consideration a contract under which the plaintiff was entitled to receive one-third of the net profits of a particular business, to be ascertained by taking an account of stock, "and from the outstanding accounts of the firm there shall be first deducted five per cent. there-

of to cover losses and bad accounts." Contention arose as to the meaning of the words "outstanding accounts." The court stated the respective contentions of the parties at page 111 of the opinion as follows:

> "The argument for the plaintiff is, that the language of the contract cited plainly means that five per cent is to be deducted or allowed for bad accounts from the outstanding accounts, whether the bad accounts in fact amount to that much or not * * * The argument for the defendant is, that there is an immemorial usage or custom among the merchants of Portland to charge all accounts considered uncollectible or bad accounts, to profits and loss, and that such bad or uncollectible accounts are not to be considered or estimated in determining the net profits; that the parties to the contract had full knowledge of such custom and made the contract with reference to it, and that, construing the contract in contemplation of such usage or custom, the provisions of the contract adverted to, only meant, or were intended to mean, that five per cent should be deducted for bad accounts from the outstanding accounts as remained after the uncollectible or bad accounts had been segregated by charging them to profit and loss. It thus appears that the real question at the bottom of the controversy is, how shall bad accounts, to cover losses, be deducted under the contract as provided?—from outstanding accounts, after uncollectible or bad accounts have been segregated and charged to profit and loss, or from the outstanding accounts, including good and bad accounts?"

The court then proceeded to hold that the phrase "outstanding accounts" in a general sense means such accounts as are due, unpaid and uncollectible, including both good and bad accounts which are due and unpaid. It upheld, however, the introduction of parol evidence in that case to show that the phrase "outstanding accounts" in the contract under examination, meant "outstanding accounts" after the good accounts had been segregated from the bad accounts and the bad accounts first deducted from the outstanding accounts. It was strenuously contested that the *proof* so offered was inadmissible because it violated the plain terms of the contract, which needed no extrinsic *proof* to aid in its interpretation. The court recognized the rule but held it inapplicable, and rejected the argument because it was based upon "treating the words in their general sense when the language of the contract, its subject matter, and the usage of trade, show that they have an accepted signification different from their common meaning."

It is the argument of the plaintiff in error in this case that the phrase "crop to be raised and grown by the seller" bears the same meaning, with respect to a lessee, that it bears to an owner. The contract before this court for interpretation proclaims in every material provision that it had to do with hops which were to come into being and thereafter under the control of the seller because of actual production by him, and that it was not intended to cover hops which the seller would be required to buy either from his landlord or in the open market.

In an elaborate note connected with the case of First National Bank of Van Buren vs. Cazort & McGehee Co., 123 Ark. 605, found in 1917 C. L. R. A. (N. S.) page 7, which note covers the sale or mortgage of future and growing crops, the editors point out, at page 30 of the opinion, that one of the chief difficulties to be met with in connection with descriptions of mortgages on future crops is the matter of construction. They say: "In view, however, of the diversity of the situations covered and of the descriptions employed in the cases decided, it is not possible to formulate any general rules, and a discussion of the subject must necessarily be limited to a consideration of the specific decisions."

None of the cases cited in this note is close enough in point of fact to the case at bar to make a detailed consideration of these authorities of interest. However, we call attention to the case of Cobb vs. Daniel, 105 Ala., page 325, in which the court held that the phrase "entire crop grown by me the present year, or which I might aid in or cause to be grown, on my lands, or any other lands that I might cultivate, or aid in or cause to be cultivated," was sufficiently broad in terms to cover "whatever interest J. C. Ragan may have had in the crops," and by necessary implication from the decision in this case it appears that the phrase above set forth was inadequate to include that part of the crops raised in which J. C. Ragan had no interest.

In the case at bar the defendants contend for no construction of the contract subversive of that which would impose on them an obligation to deliver all of the hops

produced on the premises which they acquired and were in position to deliver as the result of such production. It is not disputed that they faithfully delivered all of the hops so owned by them at sixteen cents a pound when the market price for hops was eighty-five cents. But the fact that they faithfully performed the contract to their financial disadvantage is a poor reason that it should be so construed as to impose upon them an obligation which it was never intended that they should bear, and to obligate them to deliver not only the hops produced on the land in question, which they owned and controlled, but also to obligate them to go out in the open market and buy hops, when there is not a phrase in the contract that suggests the idea that they were ever to buy hops to deliver, but the contract, taken by its four corners, can only mean that they were to deliver all of the hops under their control.

The Supreme Court of Arkansas had under consideration, in the case of Blakemore vs. Eagle, 73 Ark. 477, a trust deed covering a future crop, in the following words: "The entire crop of cotton and corn that I may raise or cause to be raised and cultivated during the year 1898 on my plantation known as the Blakemore Place, in Lonoke County." The lower court held that this phrase included all of the cotton grown on the place, not only that raised by Blakemore himself, but some which was delivered to him by his tenants in payment for supplies which Blakemore had furnished them. But the Appellate Court, while conceding that the decision of this point was not necessary to a decision of the case, held: "We are inclined to the opinion that the cotton

delivered to Blakemore by his tenants in settlement of accounts for supplies furnished by him was not, as the court held, covered by the trust deed." If cotton actually grown on the place by the tenant of the landlord and delivered to and owned by the landlord was not covered by a mortgage on "the entire crop of cotton and corn that I might raise or cause to be raised" how much less is it sound in this case to contend that the phrase "crop to be raised and grown by the seller" on leased premises, is so clear in meaning as to preclude the introduction of parol evidence covering the facts and circumstances which surrounded the parties to the contract at the time of its execution, to assist the court in answering the question as to whether that phrase meant every pound of hops that was in fact produced on the premises described in the contract, or only that part of the crop produced, acquired and owned by the seller as a result of his farming operations under the lease.

In conclusion it is only necessary to observe that the legal principle relating to this action is elementary. If the contract as written is lacking in certainty, the judgment of the lower court should be affirmed. The learned trial judge who had the contract to construe felt that he could not properly interpret it without extrinsic aid to develop the facts and circumstances surrounding the parties at the time of its execution, so as to determine their true intent. If the contentions of the defendants in error are correct, he was not only justified but required to receive the evidence which was offered, and the judgment from which this appeal has been taken should be affirmed, or the case sent back for a new trial,

in the event this court should believe there to have been an issue of fact which was improperly withheld from the jury.

Respectfully submitted,

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